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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1058

MIDLAND COOPERATIVE WHOLESALE, INC.,
PETITIONER,

VS.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY OF MATTER INVOLVED.

In an administrative proceeding, arising under the provisions of the Bituminous Coal Act of 1937 (50 Stat.

72, Pub. No. 34, 77th Cong., 1st Sess., 15 U. S. C. A., Secs. 828-51), the Bituminous Coal Division issued an order (R. 114) denying the application (R. 7) of petitioner, Midland Cooperative Wholesale, Incorporated, of Minneapolis, Minnesota, the right to register as a "Distributor" under Section 4 II (h) of the Act, but offered petitioner the right to qualify as an "intervening agency" under the provisions of the latter part of paragraph 13 of Section 4 II (i).

Petitioner filed Objections (R. 123) to the order contending it to be unlawful on the ground that it arbitrarily disqualifies petitioner as a "distributor" and offers to allow petitioner to register as an "intervening agency," with arbitrary and unlawful restrictions. The objections were overruled.

A statutory proceeding to review the order pursuant to Section 6 (b) of the Act was prosecuted to the Eighth Circuit Court of Appeals, St. Louis, Missouri. The court affirmed the order (R. 141).

II.

STATEMENT OF MATTER INVOLVED.

(1)—*The Facts.* The essential facts in the case are not disputed. Petitioner, Midland Cooperative Wholesale, is a non-profit wholesale cooperative association organized in 1926 under the laws of Minnesota (R. 7, 91, 102). Petitioner is owned by its common stockholders consisting of approximately 200 retail cooperative associations organized and operating in Minnesota, Wisconsin, Iowa and South Dakota. The common stock in the retail associations is owned by approximately 110,000 individual members of whom approximately 85% are farmers. All of these 200 constituent retail associations are not so-called "*bona fide* and legitimate farmers' cooperative organizations." Since the primary purpose of many of them is to furnish consumers goods to their members, they fall within the category of

consumers cooperatives (R. 40-41). The record does not show to what extent the so-called consumers cooperatives are dominated by farmers. Petitioner serves in the capacity of a wholesaler to (or purchasing agent for) its member associations, supplying them with many types of commodities (R. 133). Since 1934 petitioner has been supplying bituminous coal to about 45 of its constituent retail associations (R. 68). The coal purchased by petitioner for shipment and resale to its retail cooperative member associations is purchased chiefly from producers operating coal mines in West Virginia and eastern Kentucky (R. 71). All coal handled by petitioner is purchased and resold in not less than cargo or railroad carload lots (R. 47).

Under the Minnesota law and its articles of incorporation (R. 133) and by-laws (R. 126) petitioner is required annually to distribute its "undivided surplus" or "net income" (popularly termed "patronage savings") on the basis of patronage. Its patronage savings are determined at the close of each fiscal year. These patronage savings are thereupon, as a rule, partly refunded in cash and partly left with petitioner as loan capital in accordance with the decision of the board of directors, to be approved by the members.

If petitioner should have been permitted to register with the Bituminous Coal Division as a "distributor" it would be able to purchase coal in cargo or carload quantities from "producers" at the mines and receive the allowable discount fixed by the Division on equal terms with other distributors. Obviously, if petitioner should be able to distribute the coal to its constituent retail cooperative associations at a cost less than the amount of the allowable discount, it would show a savings on the discount at the close of its fiscal year.

On May 22, 1941, the director of the Bituminous Coal Division entered the following order (R. 115) which was affirmed by the court below:

"It is Ordered That petitioner, Midland Wholesale Cooperative, may qualify as an intervening agency under paragraph 13 of Section 4 II (i) of the Act, for all sales of coal in not less than cargo or railroad carload lots to retail associations which are *bona fide* and legitimate farmers' cooperative organizations, in the following manner:

"(a) By certifying to the Bituminous Coal Division, under oath, the names of all its retail associations which are *bona fide* and legitimate farmers' cooperative organizations duly organized under the laws of the state in which they are incorporated;

"(b) By agreeing, under oath, that it will not accept or retain any discount, price allowance or commission on any bituminous coal which it purchases for resale to others (fol. 222) than the *bona fide* and legitimate farmers' cooperative organizations whose names are filed with the Division."

Petitioner hereby seeks to have the opinion of the court below reviewed and the above order set aside.

Subparagraph (b) of the order denies petitioner the right to register with the Division as a "distributor" and therefore prevents petitioner from receiving from "producers" the "maximum discount or price allowances," which Section 4 II (h) of the Act authorizes, on any bituminous coal which petitioner purchases for resale to its constituent member associations which are so-called consumers cooperative associations. The Division, however, authorizes petitioner to receive such discounts or price allowances from "producers" on all coal which petitioner would purchase for resale to its constituent member associations which are so-called "*bona fide* and legitimate cooperative farmers' organizations." The Division holds (R. 120) that the latter part of paragraph 13 of Section 4 II (i) grants an "*exemption*" to so-called farmers cooperative associations as distinguished from so-called consumers cooperative associations.

(2)—*Statute Involved.* The forepart of Section 4 provides for promulgation of a marketing code and further provides,

> "* * * The code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal."

The forepart of Section 4 also provides that *producers* accepting membership in the code shall be code members. *Distributors* are not code members. Section 4 II provides that,

> "The Commission (Division) shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations."

Section 4 II (e) provides that,

> "No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission (Division), and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code."

Section 4 II (h) provides that,

> "The Commission (Division) shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as 'distributors,' who purchase coal for resale and sell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal of the prices and marketing rules and regulations established under this section."

Paragraph 12 of Section 4 II (i) provides that the following practices with respect to coal shall be unfair

methods of competition and shall constitute violations of the code:

> "Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they or any of them secure either directly or indirectly a discount, dividend, allowance, rebate, or a price other than that determined in the manner prescribed by this Act."

Paragraph 13 of Section 4 II (i) provides that,

> "It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any *bona fide* and legitimate farmers' cooperative association duly organized under the laws of any state, territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities."

Section 12 of the Act authorizes cooperative marketing of coal:

> "Subject to the approval of the Commission (Division), a marketing agency may, as to its members or such marketing agency may, as between and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices or above the effective maximum prices prescribed in accordance with Section 4: Provided, that no such approval shall be granted by the Commission (Division) unless it shall find that the agreement under which such agency or agencies proposes to function (1) will not unreasonably restrict

the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission (Division) and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission (Division)."

(3)—*Holdings of the Court Below.* The court below holds that petitioner is disqualified to be registered as a "distributor" because, if it should not use all of the allowable discounts in performing the services of a distributor, it would save the remainder thereof for refunding to its constituent retail member associations at the close of its fiscal year, which associations are consumers member associations as distinguished from so-called farmers member associations. The cooperative member associations, of course, would co-mingle savings which they receive from petitioner, if any, for refunding to their members, the ultimate consumers of the coal.

It should be pointed out in particular that petitioner would realize savings, too, on any charge it would add to the minimum price at the time of resale to its constituent member associations. The Division's order not only does not prohibit or control the refunding of patronage savings from this source, but in fact appears to *sanction* such refunding. This portion of the order is hereinafter alleged to be so obviously faulty as to prove the invalidity of the entire order.

Furthermore, the court holds that even if petitioner should not be able to save any of the allowable discount and should actually suffer a loss in the distribution of coal to its consumers member associations, it would, nevertheless, operate in violation of the Act as to such member

associations because petitioner's corporate character and the law of Minnesota require it to return the savings, if any, to its members. Primarily, therefore, petitioner is disqualified upon its corporate character and not on whether or not it may ever make any savings on the allowable discount. In other words, the court holds that the mere legal requirement of petitioner to determine and refund in cash, or allocate to loan capital, any savings on its operations to its retail cooperative member associations which are consumers cooperative retail associations is the equivalent of granting to those associations "directly or indirectly a discount, dividend allowance, rebate, or a price other than that determined in the manner prescribed by this Act."

Briefly summarized, the court below holds that patronage savings are, as a matter of law, by nature the equivalent of the unlawful discounts, dividends, allowances, or rebates prohibited by paragraph 13 of Section 4 II (i) of the Act.

Neither the Division nor the court hold that petitioner engages in any other type of unlawful rebating or unfair competitive practices except those of handling its patronage savings derived from the allowable discount, at the close of its fiscal year, in the manner herein described. The court holds that petitioner's corporate character itself or its actual practice of determining such patronage savings at the close of the fiscal year and the refunding in cash, or allocation thereof to loan capital for a period of years, are unlawful "matters and transactions in or directly affecting interstate commerce in bituminous coal." It, therefore, affirmed the order of the Division.

III.

JURISDICTIONAL STATEMENT.

Section 240, amended, Judicial Code (28 U. S. C. A., 347), invests the Supreme Court with jurisdiction to re-

quire by certiorari that the cause sought to be reviewed shall be certified to it. Furthermore, Section 6 (b) of the Bituminous Coal Act of 1937 provides that the judgment and decree of the court below, affirming, modifying, and enforcing or setting aside, in whole or in part, any order of the Bituminous Coal Division shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., Tit. 28, Secs. 346 and 347).

The date of the judgment or decree sought to be reviewed (R. 170) in January 27, 1942. The date of the opinion (R. 141) is also January 27, 1942.

IV.

THE QUESTIONS FOR DECISION.

The proceeding to review the opinion of the court below presents the following questions, namely:

(1) Does petitioner's corporate character alone disqualify it from having registration as a "distributor" of bituminous coal, as a matter of law, based upon the admitted fact that petitioner's corporate character requires that it shall, at the close of the fiscal year, determine and refund in cash, or allocate to loan capital, all patronage savings, if any, to its constituent member associations which are so-called consumers associations as distinguished from its constituent member associations which are so-called "*bona fide* and legitimate cooperative farmers' organizations"?

(2) Does the admitted actual practice of petitioner at the close of each fiscal year in determining and refunding in cash, or allocating to loan capital for a period of years, all patronage savings in favor of its constituent retail member associations which are consumers associations constitute the unlawful granting of rebates or

other allowances in and intimately affecting interstate commerce in bituminous coal which are prohibited by paragraph 12 of Section 4 II (i)?

(3) Are patronage savings of petitioner, which are its only practices under attack, by the inherent nature thereof, the legal equivalent of unlawful rebates or price allowances which are not created or controlled by state laws or by economic or cooperative principles?

(4) When the Congress enacted the Bituminous Coal Act of 1937 did it intend to include all patronage savings of all types of cooperative associations within the letter or spirit of the practices mentioned in paragraph 12 of Section 4 II (i), which practices are declared to be unfair methods of competition?

(5) Are patronage savings within the body of evils Congress intended to cure?

(6) Did the Congress intend that the latter part of paragraph 13 of Section 4 II (i) should constitute an "exemption" of so-called "*bona fide* and legitimate farmers' cooperative organizations," but leaving other types of cooperative associations within the prohibitions of paragraph 12 of Section 4 II (i)?

(7) If the latter part of paragraph 13 of Section 4 II (i) shall be construed as an "exemption" to farmers cooperative associations, may farmers cooperative associations, if they so desire, engage in the conventional type of rebating and making of price allowances, which have from time immemorial "created savage competition in the bituminous coal industry," in addition to handling patronage savings in accordance with state laws under which incorporated at the end of their respective fiscal years?

(8) Are the "practices" of petitioner in determining and refunding in cash, or allocating to loan capital,

all patronage savings, if any, at the close of the fiscal year (constituting the basis of the disqualification), "transactions in or directly affecting interstate commerce in bituminous coal," or, are these "practices" of petitioner which only have been condemned by the Division and the court below too remote from the current flow of bituminous coal and the market price considerations in connection therewith to invest in them the elements of interstate commerce?

(9) May it be held within judicial reasoning that the Congress intended to say that the determining and refunding in cash, or allocating to loan capital, all patronage savings, if any, at the close of the fiscal year, constitutes at that time a "price allowance" on the market price of the coal itself which moved in interstate commerce many months previously? Or, are the patronage savings something legally different from the unlawful rebates and price allowances mentioned in paragraph 12 of Section 4 II (i)?

(10) (a) Is not the order so vicious as to render itself void, inasmuch as it shows on its face an unlawful sanction that petitioner will be permitted thereunder to purchase coal for resale "to others," *i. e.*, its constituent retail member associations, which are consumers associations, providing *only* it will agree not to *"accept or retain any discount, price allowance or commission"?*

(b) Would not petitioner, after commencement of operations under the order, regardless of its disqualification thereunder to receive the allowable discount, be compelled to refund to its retail member associations which are its retail consumers association (*i. e.*, "to others") any patronage savings derived from savings on any amount added to the minimum price of the coal at the time of resale, and thereby commit an unfair competitive practice with the sanction of the Division?

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner seeks to have the opinion reviewed on the following grounds:

(1) It is in conflict in principle with the decisions of other circuit courts of appeals on similar matters concerning rebating or unfair trade practices under other federal statutes.

(2) The court below has decided one or more important questions of federal law concerning the legal nature of patronage savings of cooperative associations which have not been, but should be settled by the Supreme Court.

(3) The court below has decided one or more important federal questions concerning interstate commerce and Congressional intent in conflict with applicable decisions of the Supreme Court.

(4) In deciding that patronage savings of cooperative associations are by nature the equivalent of unlawful rebating, frequently prohibited in federal statutes, the court below has decided a question of national importance which has never before been decided by any federal court. It is a question of first impression which the Supreme Court should decide. This principal question is particularly important to cooperative associations throughout the nation, including marketing associations dominated by farmers as well as consumers associations dominated by farmers. It is also important to consumers associations dominated by other occupational groups than farmers, *but including farmers.* This principal question is important to cooperative associations also because of the numerous war orders which are being issued to control prices and to prohibit rebating and other unfair trade practices. It

is suggested that these war orders do not reveal by way of express language whether patronage savings of cooperative associations are included within their prohibitions. The construction of the court below, if applied to war orders, containing prohibitions against rebates and price allowances, threatens with destruction the entire cooperative movement and stops the functioning of state cooperative laws in respect of all commodities, equipment or supplies within the control of such war orders.

(5) The attention of the court is directed to the fact that within the last ten years practically all of the states have enacted so-called "Fair Trade Acts." These Acts contain a formula for setting wholesale and retail prices on consumers goods. It is unlawful to sell at a price below such so-called fair prices. With the single exception of the State of Michigan these state laws do not carry an *explanatory provision* to the effect that they are not to be construed to prevent cooperative associations from refunding patronage savings. Therefore, the question also arises under these state laws whether the refunding of patronage savings by cooperative associations at the end of the fiscal year constitutes a price adjustment which fixes the actual sale price at a point below the originally determined fair trade price. It is very important, therefore, that the Supreme Court should grant certiorari in order that it may give a decision as to the true legal nature of patronage savings of non-profit cooperative associations incorporated under laws of more than thirty states whose business transactions are largely in interstate commerce and subject to price control regulations under various federal laws and under an ever increasing flow of war orders issued by the executive branches of the United States.

(6) Since upon inspection thereof the order on its face shows itself to be so self-conflicting as to constitute a nullity, it is suggested that the action of the court below sanctions such a departure from the accepted and

usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court. Subsection (b) of the order plainly shows that petitioner *will be permitted thereunder* to purchase coal for resale "to others," *i. e.*, to its constituent retail member associations which are consumers associations, providing *only* that it will agree not to *"accept or retain any discounts, price allowance or commission."* Upon such authority, regardless of its inability to receive the discount which "distributors" may receive from "producers," this petitioner, under its corporate character and the law of Minnesota, would be duty bound to refund any patronage savings from savings realized on any amount added to the minimum price at the time of resale to its retail cooperative member associations (*i. e.*, "to others"), which are consumers cooperative associations, and thereby commit an unfair competitive practice (according to the holding of the Division and the court below that "patronage savings" are the same thing as "rebates" or "price allowances") with the sanction of the Division. Petitioner cannot lawfully accept the unlawful sanction of the order. It cannot accept the proposition that its patronage savings derived from one source only (*i. e.*, from the allowable discount) are unlawful but that those derived from another source (*i. e.*, from an amount added to the minimum price at time of resale) are lawful. The Division and the court hold that all patronage savings are unlawful because they are the same thing by nature as "rebates" or "price allowances." Nevertheless, they sanction, inconsistently, that the petitioner will be permitted to refund patronage savings, excepting those derived from the allowable discount, in the usual manner.

If patronage savings derived from savings on the allowable discount are "rebates" or "price allowances" so are patronage savings derived from savings on any amount added to the minimum price at the time of resale by petitioner. Patronage savings cannot be partly lawful

and partly unlawful, *i. e.*, partly pure and partly impure.

Moreover, if petitioner can "rebate" patronage savings derived from a source other than the allowable discount, it logically follows that the profit-taking "distributors," likewise, would be permitted to grant "rebates" or make "price allowances" on profits derived from any amount they may add to the minimum price of the coal at the time of resale.

The logical effect of the inconsistent order and the holding of the court is the destruction or nullification of the order. The Supreme Court should, therefore, exercise its power of supervision in reference to the affirmance of this self-conflicting order by the court below.

Wherefore, Petitioner prays that a writ of certiorari may be issued under the seal of the Supreme Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to the Supreme Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 12085, Civil, *Midland Cooperative Wholesale, Petitioner,* v. *Harold L. Ickes, etc., et al., Respondents,* to the end that this cause may be reviewed and determined by the Supreme Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Supreme Court and the order of the Bituminous Coal Division set aside, and for such further relief as to the Supreme Court may seem proper.

Dated March 16, 1942.

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SUPPORTING BRIEF AND ARGUMENT.

Citation of Opinion. The opinion of the Circuit Court of Appeals (R. 141) had not been reported in the Federal Reporter up to March 16, 1942.

Statement. A statement of the case has been included in the Petition for Certiorari contained herein.

Specification of Reasons for Allowance of Writ. The same reasons relied on for the allowance of the writ as are contained in the petition for certiorari are urged in this Supporting Brief.

Jurisdictional Statement. A statement of the grounds on which the jurisdiction of the Supreme Court is invoked is contained in the Petition for Certiorari.

ARGUMENT.

Preliminary. Petitioner emphasizes that it has not contended during this proceeding or at any other time that it is "*exempt*" from the unfair trade practices enumerated in paragraph 12 of Section 4 II (i). Petitioner concedes that it, on equality with all others, including farmers cooperative associations, should be and is legally obligated not to commit any of the unfair trade practices which are within the spirit and meaning of those enumerated in paragraph 12 of Section 4 II (i). If petitioner should be authorized to handle coal as a "distributor" or as an "intervening agency," without the arbitrary and unreasonable restrictions included in the order, it concedes that it would not only be amenable to regulation with reference to the prohibitions included in paragraph 12 of Section 4 II (i), but it would also be amenable to all other provisions of the Act and the regulations of the Bituminous Coal Division on the same or equal terms as all other persons and registrants.

Petitioner's primary contention is that patronage savings, because of the inherent nature thereof, are not within the meaning or intent of the prohibitions specified in paragraph 12 of Section 4 II (i), or of any other provisions of the coal Act pertaining to unlawful practices. Petitioner's secondary contention is that determining and refunding in actual cash, or allocating the patronage savings to loan capital, at the end of the fiscal year, do not constitute "practices" which are "in and directly affecting interstate commerce in bituminous coal."

These are the questions which petitioner requests the Supreme Court to decide. The court below did not discuss the question of whether or not patronage savings are by nature the legal equivalent of rebates and the other unfair methods of competition enumerated in paragraph 12 of Section 4 II (i). It assumed that patronage savings and rebates and the other unfair competitive practices are, as a matter of law, alike. It is, therefore, respectfully requested that the Supreme Court shall grant certiorari to determine whether patronage savings and rebates and the other unfair methods of competition enumerated in paragraph 12 of Section 4 II (i) are identical things, as a matter of law.

Moreover, it seems not inappropriate within this petition for certiorari to suggest to the Supreme Court the far reaching effect of the order and opinion of the court below. Inasmuch as the order would prohibit petitioner from engaging in the bituminous coal business with its constituent retail member associations which are consumers cooperative associations, as distinguished from so-called farmers associations, on equal terms with registered "distributors," who could accept and retain the discount per ton which "producers" may allow, it is obvious that petitioner would be forced to quit handling coal for its constituent retail member associations. It could not compete with "distributors" who would go into the markets with an advantage over petitioner equal to the amount of the discount per ton. It would not be satis-

factory for it to offer its services to only a part of its retail member associations. However, as hereinbefore stated, the order is self-destructive because of paragraph (b). It would have accomplished a purpose more consistently in harmony with the general view of the Division if paragraph (b) had been left out.

It logically follows, therefore, that if similar regulations should be enacted or promulgated (and similarly construed) by federal agencies on petroleum products, steel products, food products, and numerous other items of consumers goods, large wholesale cooperative associations like petitioner may be destroyed. Their constituent associations, whether dominated by farmers or other occupational groups, would suffer a severe set-back in aims and purposes, if not fail in business. The Congress never intended such legally impending results.

Legal Nature of Patronage Savings. Although the court below in its opinion did not directly discuss the legal nature of patronage savings (which, obviously, are identical in legal nature in consumers cooperative associations, regardless of whether such consumers cooperative associations are dominated by farmers or other occupational groups or composed of individual members from many different occupational groups), it nevertheless held them to be of the same legal nature as rebates and the other unfair competitive practices prohibited by paragraph 12 of Section 4 II (i).

Petitioner suggests that an analogous consideration of the opinion of the court below and the one entered in the first circuit in the case of *Quality Bakers of America et al.* v. *Federal Trade Commission*, 114 F. 2d 393, discloses a conflict. The case decided by the first circuit involves a construction of the Robinson-Patman Act. Petitioners were charged with having violated Section 2-(c) of the Robinson-Patman Act declaring that,

> "It shall be unlawful for any persons engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, any thing of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to any agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The petitioners claimed themselves to be "cooperatives." The Federal Trade Commission found that they were not. The court declined to pass on the question of whether or not they were cooperatives, saying, however:

> "* * * We deem it not necessary to consider whether either or both of the organizations mentioned are cooperatives within the meaning of the statute because we hold that Section 4 does not authorize cooperative associations to engage in the practices forbidden by Section 2-(c) of the Act, nor except them from its provisions. There is nothing in the language of the statute which warrants such a conclusion or such a forced construction. The action and debates in Congress to which we have been referred so indicate."

It is suggested that the statement,

> "* * * we hold that Section 4 does not authorize cooperative associations to engage in the practice forbidden by Section 2-(c) of the Act, nor except them from its provisions"

means very much. It means clearly that Section 4 "does not authorize" an exemption from Section 2-(c). It means that Section 4 relates to matters which are not included in Section 2-(c). Therefore, according to the opinion of the first circuit, patronage savings mentioned in Section 4 are by nature different things from the enumerated un-

lawful practices mentioned in Section 2-(c). It follows then that Section 4 of the Robinson-Patman Act is not an exempting or excepting proviso.

By analogy, the unfair practices in competition prohibited by paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937 are not by nature the same things as patronage savings of petitioner. By similar analogy, also, paragraph 13 of Section 4 II (i) of the coal Act is not an "*exemption*" but a clarifying or interpretative provision included to prevent misunderstanding.

The present opinion is, therefore, in conflict with the opinion of the first circuit.

In *Carter* v. *Carter Coal Company*, 298 U. S. 238, 80 L. Ed. 1160, wherein the Bituminous Coal Act of 1935 was declared unconstitutional, the Supreme Court held that the so-called "excise tax" was in fact enacted as a penalty to compel compliance with the regulatory provisions of the Act. In so holding the Supreme Court said:

> "While the law maker is entirely free to ignore the ordinary meanings of words and make definitions of his own (citing cases) that device may not be employed so as to change *the nature of the acts or things* to which the words are applied. * * * That the 'tax' is in fact a penalty is not seriously in dispute" (Emphasis supplied).

The Carter case therefore lays down the rule that the legal nature of patronage savings should be judicially explored before it can be said that they are, as a matter of law, the same thing by nature as the rebates and other unlawful competitive practices enumerated in paragraph 12 of Section 4 II (i).

If the Supreme Court will grant certiorari it will be shown on the merits that the debates in Congress clearly support the above suggestions concerning the Robinson-Patman Act and the Bituminous Coal Act and emphasize the points of conflict between the opinion of the first circuit and the one under consideration.

Exemption or Explanatory Proviso? The court below (R. 149, 150) and the Division (R. 120) have each asserted that paragraph 13 of Section 4 II (i) grants an "*exception*" or "*exemption*" to "*bona fide* and legitimate farmers' cooperative organizations" from the prohibitions of paragraph 12 of Section 4 II (i).

It was held in *Minis* v. *United States*, 15 Pet. 423, 445, 10 L. Ed. 791, 799, that,

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

The above rule is also stated in *United States* v. *Morrow*, 266 U. S. 531, 534, 69 L. Ed. 425, 427, also in *United States* v. *Lee et al.*, (C. C. A. Okla.) 108 F. 2d 936, 940, also in *United States* v. *Mullendore*, 35 F. 2d 78, 82. The same rule is announced in 59 C. J. 1091.

Petitioner suggests that if the rule above stated concerning provisos had been correctly followed by the court below it would not have construed the latter portion of paragraph 13 of Section 4 II (i) as granting an exemption or exception to farmers cooperative associations, but merely as an interpretative provision to prevent misunderstanding. The fact that it does not include consumers cooperative associations within its mere clarifying terms is of no legal consequence. It is suggested, therefore, that the holding in question is in conflict with the cases mentioned.

It has also been held that where a broad construction of a proviso to an act makes the proviso plainly repugnant to the body of the act, such construction will not be adopted. This rule suggests that a narrow construction of a proviso makes the proviso plainly repugnant to the body of the act, also. The narrow construction placed on paragraph 13 of Section 4 II (i) should, therefore, be re-

jected as in conflict with *Dollar Savings Bank* v. *U. S.*, 86 U. S. 227, 19 Wall. 227, 22 L. Ed. 80. The proviso contains no words specifying or implying that it was intended to be an "exemption."

It has already been stated that the first circuit in the case of *Quality Bakers of America et al.* v. *Federal Trade Commission*, 114 F. 2d 393, has directly held that cooperative associations are subject to the prohibitions enumerated in Section 2-(c) of the Robinson-Patman Act. Those prohibitions are practically the same by nature and name as the prohibitions enumerated in paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937. Like prohibitions have from time to time been included in numerous other federal and state statutes. Moreover, the opinion of the first circuit expressly holds that Section 4 of the Robinson-Patman Act does not exempt cooperative associations from the prohibitions of Section 2-(c) thereof. Therefore, petitioner repeats that the things prohibited in Section 2-(c) which are not exempted by Section 4 of the Robinson-Patman Act are different by nature from patronage savings mentioned in Section 4. Section 4 of the Robinson-Patman Act is therefore an interpreting or clarifying provision included merely to prevent misunderstanding. By analogy, the provision of paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937 relating to farmers cooperatives is not one granting an exemption or exception but merely an interpreting or clarifying provision for the purpose of preventing misunderstanding. Therefore, the holding of the court below to the effect that paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937 constitutes an exemption of farmers cooperatives is in conflict with the rule announced in the Quality Bakers case decided by the first circuit.

Are patronage savings matters in interstate commerce? Petitioner is convinced that its practices in determining and refunding, or allocating patronage savings to loan capital at the close of the fiscal year, are not practices

in or directly affecting interstate commerce in bituminous coal. The petitioner therefore believes the holding of the court below to the effect that the patronage savings are practices in interstate commerce is in conflict with the rule pertaining to interstate commerce announced by the Supreme Court in the case of *Schechter Poultry Corporation et al.* v. *U. S.*, 295 U. S. 495.

It is also in conflict with the rule announced in the *Apex Hosiery case*, 310 U. S. 469, 84 L. Ed. 1311, wherein the Supreme Court said that restraints on interstate commerce prohibited by the Sherman Act are only those which are so substantial as to affect *market prices.* It further said that there are no illegal restraints on interstate commerce,

> "* * * unless the restraint is shown to have or is intended to have *an effect upon prices in the market* or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition" (Emphasis supplied).

In the case of *Carter* v. *Carter*, 298 U. S. 238, 317, 80 L. Ed. 1192, in discussing the question of interstate commerce of bituminous coal under the Bituminous Coal Act of 1935, the court said:

> "But Congress may not use this protective authority as a pretext for the exercise of power to regulate activities and regulations within the states which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all of the activities of the people to the subversion of the fundamental principle of the Constitution."

It is suggested, therefore, that the holding of the court below, that the patronage savings determined and refunded or allocated to loan capital, at the close of the fiscal year, are matters in and directly affecting interstate commerce, is in conflict with the Carter case.

Congressional Intent. In *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 84 L. Ed. 1311, the Supreme Court said:

> "The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of legislative history and of the particular evils at which the legislation was aimed."

The prohibitions of the Sherman Act to which the court made reference are quite similar to the prohibitions enumerated in paragraph 12 of Section 4 II (i) of the Bituminous Coal Act of 1937. It may be properly stated therefore that the prohibitions of paragraph 12 of Section 4 II (i) are not stated in terms of precision or of crystal clarity. Since the court below did not interpret the words of paragraph 12 of Section 4 II (i) in the light of its legislative history and in the light of the particular evils at which the Bituminous Coal Act of 1937 was aimed, it follows that the court below departed from the procedural rule announced in the Apex Hosiery Company case. It made no substantial effort *"to give content to the statute."* It assumed that patronage savings are within the letter of paragraph 12 of Section 4 II (i) and let it go at that.

Also, in *Stewart* v. *Kahn*, 78 U. S. 493, 11 Wall. 493, 20 L. Ed. 176, the court stated:

> "In construing a statute the court *must consider the evils which existed*, the remedy prescribed, the object to be accomplished, and the considerations by which the lawmakers were governed" (Emphasis supplied).

It is within the power of courts to declare that a thing which is within the letter of a statute is not governed by the statute, because not within its spirit or the

intention of its makers. *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 36 L. Ed. 226.

In *United States of America, I. C. C. et al.* v. *American Trucking Association, Inc., et al.*, 310 U. S. 534, l. c. 542, 84 L. Ed. 1345, the court said:

> "In the interpretation of statutes the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of the statute, particularly in a law to meet many needs of a major occupation. * * * When that meaning has led to absurd or futile results, however, this court has looked beyond the words to the purpose of the Act."

Finally, in *U. S.* v. *Cooper Corporation et al.*, 312 U. S. 600, 85 L. Ed. 1071, in settling the question whether the United States is "any person" who may sue for treble damages under the Sherman Act, the Supreme Court recently said:

> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction.
>
> * * * * * * *
>
> "2. The connotation of a term in one portion of an Act may often be clarified by reference to its use in others."

Petitioner is convinced that the opinion of the court below is in conflict with the foregoing opinions of the Supreme Court upon the question of the intent of the

Congress, when considered from the viewpoint of the body of evils that the Act was intended to cure. These evils were so widespread and disturbing to the morals, peace and safety of the nation as to evoke from the voice of former Justice Cardozo in the *Carter case, supra*, the bitter indictment that "free competition had been degraded into anarchy" in the bituminous coal industry. Speaking in words of equal terse realism, the Supreme Court in the Sunshine case (310 U. S. 381) more recently, said: "The history of the bituminous coal industry is written in blood as well as in ink."

Surely, the Congress did not intend to bring the democratic practices of cooperative associations, which seem destined to produce economic and social benefits of immeasurable value, within the category of the vile evils which the Supreme Court would soon afterwards so justly condemn.

In Conclusion, it is therefore requested that the Supreme Court, for the reasons herein set forth, will grant its writ of certiorari in furtherance of justice in this cause.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1058

MIDLAND COOPERATIVE WHOLESALE, PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 141–170) has not yet been published. The opinion of the Director of the Bituminous Coal Division appears in the Record at pages 114–121.

JURISDICTION

The decree below was entered on January 27, 1942 (R. 170–171). The petition for a writ of certiorari was filed on March 20, 1942. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 6 (b) of the Bituminous Coal Act of 1937, c. 127, 50 Stat. 85, 15 U. S. C., sec. 836 (b).

QUESTIONS PRESENTED

1. Whether the Director was correct in holding that a consumers cooperative is not entitled to discounts from the minimum prices as a "distributor" under the Bituminous Coal Act of 1937.

2. Although we do not believe that any such question need be decided,[1] petitioner also claims that the case involves the question whether the intrastate payment or use of patronage dividends based upon savings from interstate purchases is a practice in or directly affecting interstate commerce in coal.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72–90, 15 U. S. C., secs. 828–851, extended April 11, 1941, Pub., No. 34, 77th Cong., 1st Sess.[2] The provisions of the Act primarily involved here are:

> SECTION 4 II (h). The Commission shall, by order, prescribe due and reasonable

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[1] See p. 15, *infra*.

[2] The Act, as initially passed, was to be administered by the National Bituminous Coal Commission. However, by the terms of the Executive Order (Reorganization Plan No. II, submitted by the President to the Congress on May 9, 1939, Sections 4 (a) and (b), effective July 1, 1939, Pub. Res. No. 20, 76th Cong., 1st Session, c. 193, approved June 7,

maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

SECTION 4 II (i). The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

* * * * *

12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are [or] any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

13. * * * It shall not be an unfair method of competition or a violation of the

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1939), made pursuant to authority granted in the Reorganization Act of 1939 (Pub., No. 19, 76th Cong., 1st Sess., approved April 3, 1939, c. 36, 53 Stat. 561, 5 U. S. C., sec. 133) the functions of the Commission were transferred to the Department of the Interior and the Act is now being administered by the Bituminous Coal Division of the Department of the Interior, hereinafter referred to as the "Division."

code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

STATEMENT

The essential facts here are not disputed.[3] Midland Cooperative Wholesale, petitioner, is a nonprofit wholesale cooperative organized in 1926 under the laws of Minnesota (R. 7, 91, 102). It is owned by approximately 200 retail cooperative associations operating in Minnesota, Wisconsin, Iowa, and South Dakota (R. 40–41). Those retail associations are composed of approximately 110,000 individual members of whom over 85 percent are farmers. All these constituent associations are not farmers' cooperatives, many falling

[3] A more detailed statement of facts is found in the Director's Findings of May 22, 1941 (R. 116–121), with which petitioner does not take issue.

within the category of consumers' cooperatives (R. 40–41). Midland serves in the capacity of a wholesaler to (or purchasing agent for) its member cooperative associations, supplying them with many types of commodities (R. 133). Since 1934 Midland has been supplying bituminous coal to about 45 of its constituent retail associations (R. 68). The coal purchased by petitioner is purchased chiefly from mines operating in West Virginia and eastern Kentucky and shipped to the retail associations by rail or lake (R. 71). Petitioner's annual sales to its retail associations have amounted to about 600 carloads or about 24,000 tons of coal (R. 90). All coal handled by Midland is purchased for resale and is resold in not less than cargo or railroad carload lots (R. 47).

Under the Minnesota Law (R. 102)[4] and its Bylaws (R. 129–130), petitioner is required annually to distribute its "undivided surplus" or "net income" on the basis of patronage. Patronage dividends are distributed to each constituent retail association on the basis of gross operating margins on the total quantity of each major commodity purchased by it; a portion is left with petitioner as loan capital (R. 25, 103).

On December 9, 1940, petitioner filed an application (R. 7, 115), pursuant to Section 304.11 of the Rules and Regulations for Registration of Distributors, seeking permission to register as a dis-

[4] Exhibit 2, not printed (R. 43, 139).

tributor within the meaning of Section 4 II (h) of the Act.

After a hearing (R. 35–101) and waiver of an examiner's report (R. 99–100, 116), Director Howard A. Gray of the Bituminous Coal Division on May 22, 1941, made and entered his Findings of Fact and Conclusions of Law (R. 116–121). He found that petitioner did not come within the exception for "bona fide and legitimate farmers' cooperative organizations" contained in Section 4 II (i) 13, and that petitioner could not qualify as a "distributor" because the benefits of any discounts would accrue to the ultimate consumer in violation of Section 4 II (i) 12 (R. 120–121). The Director concluded, however, that petitioner could qualify as an "intervening agency" pursuant to paragraph 13 of Section 4 II (i) in connection with that portion of the coal which was resold to bona fide and legitimate farmers' cooperatives.

To that end the Director entered an order (R. 115), as follows:

> It Is Ordered That petitioner, Midland Wholesale Cooperative may qualify as an intervening agency under paragraph 13 of Section 4 II (i) of the Act, for all sales of coal in not less than cargo or railroad carload lots to retail associations which are bona fide and legitimate farmers' cooperative organizations, in the following manner.
>
> (a) By certifying to the Bituminous Coal Division, under oath, the names of all its

retail associations which are bona fide and legitimate farmers' cooperative organizations duly organized under the laws of the state in which they are incorporated;

(b) By agreeing, under oath, that it will not accept or retain any discount, price allowance or commission on any bituminous coal which it purchases for resale to others than the bona fide and legitimate farmers' cooperative organizations whose names are filed with the Division.

On July 19, 1941, petitioner filed in the Circuit Court of Appeals for the Eighth Circuit a petition to review this order (R. 1–2). On January 27, 1942, the Circuit Court of Appeals affirmed the Director's order (R. 141–170).

ARGUMENT

1. Section 4 II (e) of the Bituminous Coal Act prohibits the sales of coal below the minimum prices established. Section 4 II (h) provides that the Commission shall prescribe reasonable maximum discounts for persons "herein referred to as 'distributors,' who purchase coal for resale and resell it in not less than cargo or railroad carload lots," and shall require such persons to observe the "prices and marketing rules and regulations" established under the Act.

The position of a distributor in the marketing process is substantially the same as that of a producer's own selling organization or outside sales agency, in that he performs a selling service for

the producer.[5] Accordingly, although he trades independently rather than on commission, the distributor is deemed to be entitled, by way of discount, to a share of the producer's price. This reason for allowing a discount to distributors has no application to persons who act as agents for the purchaser. On the contrary, the allowance of discounts to the latter would impair the effectiveness of the basic statutory objective of requiring all purchasers to pay the established minimum prices. Section 4 II (i) 12 shows that Congress did not

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[5] The function of the distributor as wholesale marketer for the producer is described in the Findings of Fact of the Director of the Bituminous Coal Division in *In the Matter of Prescribing Due and Reasonable Maximum Discounts or Price Allowances by Code Members to "Distributors,"* General Docket No. 12, pages 4–7, as follows:

"Producers of bituminous coal market their coals in three general ways: (1) through their own sales organizations, (2) through sales agents, and (3) through distributors. Indeed, it is almost always true that any given producer does not market all of his coal through any one channel. Instead, he generally markets part of his production through his own sales organization, another part through a sales agent, and still another part through distributors. * * *"

* * * * *

"* * * The ordinary and usual method by which a distributor conducts his business is to acquaint himself with the prices at which he could probably purchase coal at the mines and then to seek a buyer or buyers for such coal at prices that would give him a profit. Thus, before attempting to sell the coal, he obtains reasonable assurance of his ability to buy it at a price below the current market price. Once orders are secured by him, he purchases the coal at the prices previously ascertained to be available, or canvasses for still lower prices. The prices at which he has purchased the coal

intend the distributors' discount to be available to agents of the purchaser. Under that section the Code is violated by

> 12. Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they are [or] any of them secure either directly or indirectly a discount, dividend, allowance, or rebates, or a price other than that determined in the manner prescribed by this Act.

Petitioner, concededly a "purchasing agent for" its members (Pet. p. 3), is an "agency" of an "organization of retailers" whereby the latter may "secure directly or indirectly" a "discount" or "dividend" on the price of coal, within the meaning of the above paragraph.

That Congress considered and determined the extent to which the above statutory provisions

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have generally been the current market prices less a discount on account of the prospective resale. * * *"

* * * * *

"* * * in certain areas, rather than maintain selling organizations, producers and sales agents frequently sell some of their coal to distributors, for the reason that the volume of such producer's or sales agent's tonnage sold therein is insufficient to warrant the expense incident to the maintenance of a sales organization. The distributors to whom such coal is sold are usually either other producers or sales agents for other coal producers, or for the producers of other commodities, whose sales volume in these areas warrants the maintenance of selling organizations therein. * * *"

should apply to cooperative organizations appears plainly from the second paragraph of Section 4 II (i) 13. That paragraph provides that the Act shall not be violated by sales to "any bona-fide and legitimate farmers' cooperative organization" by sales "through any intervening agency to any such cooperative organization" or by paying or allowing any such organization or "any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed * * * to other purchasers for purchases in wholesale or middleman quantities." This paragraph demonstrates clearly, as both the Director and the lower court found, that Congress intended farmers' cooperatives to be exempt from the restrictive provisions imposed on purchasers and their agents by Section 4 II (i) 12. The last clause, in particular, shows that Congress intended the equivalent of a distributor's discount to be available to an agency purchasing on behalf of a farmers' cooperative. The presence of this specific exception limited to farmers' cooperatives indicates that other purchasers, including other types of cooperative organizations, were not to be exempt. *Expressio unius est exclusio alterius. Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 22.

Petitioner claims that the paragraph does not constitute an "exception" or "exemption" for farmers' cooperatives, but that it is "merely an interpreting or clarifying provision for the purpose

of preventing misunderstanding" (Pet. pp. 22–23); it is contended that, entirely apart from paragraph 13, cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i). This forced interpretation would make paragraph 13 unnecessary, and is hardly consistent with the restriction of the paragraph to farmers' cooperatives alone. If Congress intended that consumer or other cooperatives be given the same advantages as agricultural cooperatives it would undoubtedly have said so. The courts have frequently held that such phrases as "farmers' cooperative" are not to be construed as including other types of cooperative organizations.[6] And the reference in some federal statutes to farmers' cooperatives[7] and in others to cooperative organizations generally[8] or to consumers' coopera-

[6] E. g., *Garden Homes Co.* v. *Commissioner*, 64 F. (2d) 593, 596 (C. C. A. 7, 1933); *Sunset Scavenger Co.* v. *Commissioner*, 84 F. (2d) 453, 455 (C. C. A. 9, 1936); *National Outdoor Advertising Bureau* v. *Helvering*, 89 F. (2d) 878, 880 (C. C. A. 2, 1937); *Co-operative Central Exchange* v. *Commissioner*, 27 B. T. A. 17 (1932).

[7] Section 6 of the Clayton Act (c. 323, 38 Stat. 731, 15 U. S. C., sec. 17); Section 1 of the Capper-Volstead Act (c. 57, 42 Stat. 388, 7 U. S. C., sec. 291); the Agricultural Credit Act of 1913 (c. 252, 42 Stat. 1479, 12 U. S. C., sec. 351); Section 15 (a) of the Agricultural Marketing Act (c. 164, 49 Stat. 317, 12 U. S. C., sec. 1141 (j)); Section 203 (b) of the Motor Carrier Act (c. 498, 49 Stat. 544, 49 U. S. C., sec. 303 (b)); and Section 3 (a) (5) of the Securities Act of 1933 (c. 38, 48 Stat. 75, 15 U. S. C., sec. 77 (c)).

[8] Section 4 of the Robinson-Patman Act (c. 592, 49 Stat. 1528, 15 U. S. C., sec. 13b). That section 4 of the Robinson-

tives alone[9] demonstrates that Congress is fully conscious of the difference between the types of cooperatives and able to discriminate between them.

That consumer cooperatives were deliberately omitted from paragraph 13 appears from the legislative history set forth in detail in the opinion of the court below (R. 151–160). In summary, it is sufficient to say that an unsuccessful attempt was made when the first coal act was adopted in 1935 to enlarge the present paragraph 13 so as to make it applicable to consumer cooperatives (see R. 153–155), and that when the present Act was passed in 1937 the question of whether farm or consumer cooperative organizations should be entitled to special treatment was debated before the present, limited paragraph 13 was again included in the statute (see R. 155–157). Furthermore, when the present Act was extended in 1941, after committee hearings at which a large amount of testimony, including that of petitioner's general manager, was taken on this very subject, both House and Senate Committees declined to recommend a proposed amendment which would have brought consumer cooperatives within paragraph 13 (see R. 157–160).

Patman Act was intended to encompass consumer cooperatives as well as farmers' cooperatives is clear. See H. Rep. 2287, 74th Cong., 2d Sess., Part I, p. 17, and Part II, pp. 18–19; H. Rep. 2951, 74th Cong., 2d Sess.

[9] District of Columbia Cooperative Association Act (c. 397, 54 Stat. 480).

The Senate committee report stated (S. Rep. No. 169, p. 3, 77th Cong., 1st sess.)

> The testimony also showed that any amendment designed to allow discounts to wholesale consumer cooperatives might destroy established wholesale and retail coal dealers and provide industrial consumers with a means of evading the basic provisions of the act. More experience in the administration of the act and more detailed consideration than is possible in advance of the expiration of the act are necessary before the committee can recommend such legislation, if any, as is necessary to deal with these problems.

See to the same effect H. Rep. No. 324, p. 8, 77th Cong., 1st sess. The amendment rejected by the committees, which would have expressly permitted consumer cooperatives to obtain distributors' discounts, was subsequently offered, debated, and defeated on the floor of the House (87 Cong. Rec. 2664–2665, and withdrawn after debate on the floor of the Senate (87 Cong. Rec. 3039). In view of this legislative history it is plain that petitioner is seeking to have this Court read into the statute the substance of what Congress has repeatedly rejected.

Petitioner claims (Pet. pp. 19–21) that the decision below is in conflict with *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. (2d) 393, 399–400 (C. C. A. 1). That case held that Sec-

tion 4 of the Robinson-Patman Act (c. 592, 49 Stat. 1528, 15 U. S. C., Sec. 13b), which expressly exempts patronage dividends from the operation of that statute, did *not* exempt purchasing cooperatives from the prohibition in Section 2 (c) (15 U. S. C. Sec. 13 (c)) against the receipt of discounts from the seller of the commodity.[10] Except for the indication that exemptions for cooperatives are to be strictly construed, the case has no pertinence here.

2. Petitioner contends (Pet. p. 24) that the decision below conflicts with *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. The claim apparently is that petitioner's practices in refunding or allocating patronage dividends occur entirely within one state and thus are not in or directly affecting interstate commerce. Petitioner purchases its coal from producers in West Virginia and Kentucky (R. 71) and distributes the coal throughout four midwestern states (R. 40–41). If a patronage dividend is based upon the price paid for coal sold in interstate commerce, it is intrinsically related to the interstate sale, irrespective of whether the dividend itself crosses state lines. Cf. *United States* v. *Ferger*, 250 U. S. 199; *Currin* v. *Wallace*, 306

[10] The court assumed, for purposes of its decision, that petitioner in the *Quality Bakers* case was a cooperative organization. 114 F. (2d) at 399–400. The Federal Trade Commission had decided to the contrary (*id.*, at p. 397).

U. S. 1; *United States* v. *Wrightwood Dairy Co., Inc.,* Nos. 744, 783, present Term, decided February 2, 1942. No federal regulation of interstate prices or rates could be effective if a rebate on the interstate price could go unpunished if so contrived as not to cross a state border. Cf. *Union Pacific Co.* v. *United States,* 313 U. S. 450, 464; *United States* v. *Union Stock Yard,* 226 U. S. 286, 308; *Swift & Co.* v. *Wallace,* 105 F. (2d) 848, 861 (C. C. A. 7).

In any event, the record does not present the question which petitioner seeks to raise, and the Court would not be required to pass upon it. The Director held that petitioner was not entitled to the distributor's discount on its purchases, not that petitioner could not distribute patronage dividends. The discount on the purchase price of coal shipped interstate is plainly an integral part of the interstate price. Furthermore, since petitioner's members are located in four states, petitioner cannot properly assume, in the absence of specific supporting evidence, that the dividends paid are not themselves transmitted in interstate commerce. Finally, petitioner may not raise the point since the objection was not urged before the Commission (cf. R. 108–113, 167n). Section 6 (b) of the Act provides, *inter alia,* that "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below."

3. Petitioner asserts (Pet. pp. 13–14) that the Director's order is "self-conflicting." The order (R. 114–115) indicates that petitioner will be permitted to obtain distributor's discounts for coal resold to those of its members which are bonda fide and legitimate farmers' cooperatives. In order to insure compliance with the statutory provision prohibiting discounts to agents of purchasers other than farmers' cooperatives, petitioner was required to agree not to accept such discounts on coal to be sold to others. The order thus gives effect to all of the pertinent statutory provisions, and contains no inconsistency.

4. Despite petitioner's claim to the contrary (Pet. pp. 12–13), this case does not involve the status of patronage dividends under "various federal laws," "war orders which are being issued to control prices," or state "Fair Trade Acts." The decision below properly rested upon the language, purposes and legislative history of the Bituminous Coal Act. The Director was not called upon to, and did not, hold that the payment of patronage dividends on coal to consumer members was generally unlawful, or was even in violation of the Coal Act except where the cooperative obtained the coal at a discount from the minimum price. His decision was only that petitioner was not entitled to a special discount from the minimum prices paid producers on coal resold to such members. This is concededly (Pet. p. 12) the only case in which the point has been raised.

CONCLUSION

There exists no conflict of decisions. The decision below is plainly correct. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
ROBERT L. STERN,
Attorney.

NATHAN R. MARGOLD,
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1058.

MIDLAND COOPERATIVE WHOLESALE,
PETITIONER,

VS.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

DANIEL C. ROGERS,
1500 Iron Street,
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Supreme Court of the United States

OCTOBER TERM, 1941.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

On pages 10-11 of Brief for Respondents in Opposition the following statement appears, which characterizes the essential error of the court below and the Bituminous Coal Division:

> "Petitioner claims that the paragraph does not constitute an 'exception' or 'exemption' for farmers' cooperatives, but that it is 'merely an interpreting or clarifying provision for the purpose of preventing

misunderstanding' (Pet. pp. 22-23); *it is contended that, entirely apart from paragraph* 13, *cooperatives, whether for farmers or consumers,* are not subject to paragraph 12 of Section 4 II (i). This forced interpretation would make paragraph 13 unnecessary, and is hardly consistent with the restriction of the paragraph to farmers' cooperatives alone. If Congress intended that consumer or other cooperatives be given the same advantages as agricultural cooperatives it would undoubtedly have said so." (Emphasis supplied).

Petitioner has never contended that "cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i)." It is unfortunate that respondents and the court below have repeatedly committed the aforesaid error concerning the fundamental question in issue.

On page 17 of its brief filed in the Supreme Court in support of its petition for writ of certiorari petitioner says this:

> "Petitioner emphasizes that it has not contended during this proceeding or at any other time that it is 'exempt' from the unfair trade practices enumerated in paragraph 12 of Section 4 II (i). Petitioner concedes that it, on equality with all others, including farmers' cooperative associations, should be and is legally obligated not to commit any of the unfair trade practices which are within the spirit and meaning of those enumerated in paragraph 12 of Section 4 II (i). If petitioner should be authorized to handle coal as a 'distributor' or as an 'intervening agency,' without the arbitrary and unreasonable restrictions included in the order, it concedes that it would not only be amenable to regulation with reference to the prohibitions included in paragraph 12 of Section 4 II (i), but it would also be amenable to all other provisions of the Act and the regulations of the Bituminous Coal Division on the same or equal terms as all other persons and registrants.
>
> "Petitioner's primary contention is that patronage savings, because of the inherent nature thereof,

> are not within the meaning or intent of the prohibitions specified in paragraph 12 of Section 4 II (i), or of any other provisions of the coal Act pertaining to unlawful practices. * * *"

Petitioner's Questions for Decision, Reasons Relied on for the Allowances of the Writ and its Argument clearly state petitioner's view as herein emphasized.

Nevertheless, based upon the aforesaid misconception of the fundamental legal questions raised by petitioner, the respondents have included in their Brief in Opposition, again, the misstatement that petitioner contends that

> "* * * cooperatives, whether for farmers or consumers, are not subject to paragraph 12 of Section 4 II (i)."

Therefore, the only reason for filing this reply brief is to take due precaution that the erroneous conception of respondents of the fundamental questions involved for review shall not be inadvertently followed by the Supreme Court. Inasmuch as respondents and the court below have so consistently taken the erroneous view as herein stated, petitioner is gravely concerned that it may not have made itself sufficiently clear pertaining to the fundamental legal questions involved, even in its petition for writ of certiorari. Petitioner desires that the erroneous conception of the respondents and the court below shall not be followed by the Supreme Court, due to a lack of clarity in petitioner's petition and brief.

Moreover, in stating that its "patronage savings" are legally different by nature from "a discount, dividend, allowance, rebate, or a price other than that determined in the manner prescribed by this Act," petitioner is not thereby providing an escape or "loop-hole" for itself from the provisions of paragraph 12 of Section 4 II (i). If the Supreme Court should adopt petitioner's view and decide that "patronage savings" (which are controlled by state

law, petitioner's charter and by-laws and by definite cooperative principles) are not the same thing as those things named in paragraph 12 of Section 4 II (i), petitioner would still be subject to all of the prohibitions named in paragraph 12 of Section 4 II (i). It could not engage in the practice of granting "discounts," "dividends," "rebates" or "allowances." It could not legally sell coal to its retail member associations at "a price other than that determined in the manner prescribed by this Act," *i. e.*, at a price below the minimum price fixed by the Division. It is a strained construction to say that the distribution of "patronage savings" resulting from cooperative marketing of coal gives to the retail cooperative associations and thence to the consumers of the coal a "price" (many months or even years later), "other than that (price) determined in the manner prescribed by this Act."

On account of its misconception of the fundamental questions involved, which misconception has been supported by the court below, respondent has urged that the consideration given by the legislative committee to include consumers' cooperative associations within the terms of the explanatory provision of paragraph 13 of Section 4 II (i) constitutes proof that the Congress intended not only to "exempt" or "except" so-called "*bona fide* and legitimate farmers' cooperative organizations" from the prohibitions of paragraph 12 of Section 4 II (i) but intended to include consumers' cooperative associations therein.

If given an opportunity to do so, petitioner will satisfy the Court that the respondent, and the court below, have an erroneous conception of the meaning and purpose of paragraph 13 of Section 4 II (i). That paragraph can not be correctly construed as exempting farmers' cooperative associations from engaging in the conventional type of rebating, discounting, or making of price allowances which the Congress intended to

eliminate. Such contention of respondent, and holding of the court below, is repugnant to the principle of numerous cases wherein the Supreme Court and other Federal courts have held that cooperative associations are amenable to the Sherman Act, the Robinson-Patman Act and similar Federal acts intended to include all alike within (and to exclude or exempt none from) the sweep of the corrective powers therein expressed.

If such misconception of respondent, and the court below, may be more thoroughly revealed on the merits, it will become clear that paragraph 13 of Section 4 II (i) is, indeed, merely an interpretative or explanatory provision to prevent misunderstanding. It will also be revealed that the great breadth and depth of the tide manifesting itself within the intent of the Congress for a corrective remedy to the evils besetting the bituminous coal industry were not stultified by outright exemption of farmers' cooperative associations therefrom. Thereupon, it will appear that it is of no importance, as a matter of law, that consumers cooperative associations were not included within the explanatory provision of paragraph 13 of Section 4 II (i).

Regardless of how the Supreme Court may decide the questions involved, it is urged that the questions shall not be left in the unclear condition as stated in the opinion of the court below and as re-emphasized in the present Brief in Opposition.

In Conclusion, petitioner requests the Supreme Court to grant certiorari in order that the opinion of the court below may be reviewed and the questions for decision clearly decided.

Respectfully submitted,

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1500 Iron Street,
North Kansas City, Missouri,
Attorney for Petitioner.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

No. 1058.

CIVIL.

MIDLAND COOPERATIVE WHOLESALE,
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VS.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF,
RESPONDENTS.

MOTION TO ENLARGE TIME FOR FILING PETITION FOR REHEARING

and

SUGGESTIONS IN SUPPORT OF MOTION.

DANIEL C. ROGERS,
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Supreme Court of the United States

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RESPONDENTS.

MOTION TO ENLARGE TIME FOR FILING PETITION FOR REHEARING.

Now comes petitioner and moves that the Court shall enlarge the time within which petitioner may file Petition for Rehearing in the above cause until the first day of the October, 1942, Term of the Supreme Court, or at least until June 1, 1942.

Respectfully submitted,

DANIEL C. ROGERS,
Attorney for Petitioner.

SUGGESTIONS IN SUPPORT OF MOTION.

On April 27 the Court entered its order denying petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. Petitioner herewith presents its motion to enlarge the time for filing Petition for Rehearing which expires under Rule 33 on May 22, 1942.

Petitioner is one of the constituent members of (1) The Cooperative League of the United States of America and (2) National Cooperatives, Incorporated. The constituent members of the latter two organizations are comprised of approximately fifteen wholesale consumers' cooperative associations similar to petitioner. Such constituent members are doing business on a large scale in various sections of the United States. The Cooperative League of the United States of America is a nation-wide educational organization. National Cooperatives, Inc., is a business organization into which petitioner and other wholesale consumers' cooperatives are federated for greater efficiency in business matters.

Petitioner desires an enlargement of the time within which to file its Petition for Rehearing so that it can confer with the officers of the aforesaid two national cooperative organizations. Petitioner, realizing the public importance of the question of law involved in the case, believes that the aforesaid nation-wide cooperative organizations will desire to make request of the Solicitor General that they be permitted to file *amicus curiae* briefs in support of petitioner's proposed Petition for Rehearing, and in such briefs to urge the public importance of the case and the importance of having the Supreme Court directly decide the legal issues involved.

In further support of its Motion petitioner informs the Court that officials of The Cooperative League of the

United States of America have already taken up with the Consumers' Counsel Division created under the Bituminous Coal Act of 1937 the matter of supporting its proposed Petition for Rehearing on the ground of the public importance of the legal questions involved.

Petitioner believes that if its proposed Petition for Rehearing may be supported with a stronger showing of the public importance of the case the Court will be justified in granting rehearing and taking jurisdiction of the case on the merits. The cooperative movement should not be required to grope in darkness in developing its rapidly expanding service program. It and its proponents and opponents should, without further delay, have a decision of the Supreme Court on the legal nature of "patronage savings" and the Congressional intent with reference thereto in the Bituminous Coal Act of 1937.

Wherefore, Petitioner prays that the Court will grant an enlargement of the time within which Petition for Rehearing may be filed until the first day of the October, 1942, Term, or at least until June 1, 1942.

Respectfully submitted,

DANIEL C. ROGERS,
Attorney for Petitioner.

Certificate of Counsel.

The undersigned counsel for petitioner, Midland Cooperative Wholesale, certifies that the foregoing Motion to Enlarge Time and the Suggestions in Support Thereof are presented in good faith and not for delay.

DANIEL C. ROGERS,
Attorney for Petitioner.

MAY 28 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

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PETITION FOR REHEARING.

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Attorney for Petitioner.

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PETITION FOR REHEARING.

Comes now the petitioner and presents this Petition for Rehearing on its Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit (which was denied on April 27, 1942) and respectfully suggests:

A.

The point that the decision of the court below is in conflict with the public policy of the State of Minnesota as expressed in its Cooperative Statutes was not raised in the petition for writ of certiorari. It is requested, therefore, that the court consider now this new reason for vacating its order and granting the petition for writ of certiorari.

The Cooperative Statutes of the State of Minnesota (R. 102) authorize the incorporation of cooperative associations for the purpose of conducting any lawful business by five or more incorporators, without respect to occupational requirements on the part of the incorporators. No distinction is made in the Minnesota law in question between so-called farmers' cooperative associations and so-called consumers' cooperative associations.

The applicable provisions of the Minnesota law (R. 102), Chapter 326, Laws of Minnesota, 1923, follow:

> "7834. Co-Operative Associations—Who May Organize—Purpose—Powers—A co-operative association may be formed for the purpose of conducting any agricultural, dairy, marketing, transportation, warehousing, commission, contracting, building, mining, telephone, manufacturing, or any mechanical, mercantile or electrical heat, light or power business, or for all such purposes or for any other lawful purpose, upon the co-operative plan, * * *
>
> "For the purpose of this act a co-operative association shall be defined as any corporation or association of ultimate producers and/or consumers organized under this act or any other statute of the State of Minnesota now existing or hereafter enacted providing for the incorporation of co-operative associations; also any central organization composed wholly or in part of such associations. The plans of organization and the business practices of any such association shall be stated in its articles of incorporation and by-laws and shall provide (a) that the ownership of capital stock therein by any individual stockholder shall not exceed the par value of $1,000; and (b) that in-

dividual stockholders shall be restricted to only one vote in the affairs of the association; and (c) that shares of stock shall not be transferable except with the approval and consent of the governing board of such association; and (d) that interest shall not be paid on outstanding or paid-up capital stock of the association in excess of 6% per annum; and (e) that the net income of such association, except such amounts as are required to be set aside as a reserve fund or permanent surplus or may be set aside by vote of the stockholders of the association, available for distribution, among the members, or patrons, or both as the case may be, shall be distributed only on the basis of patronage."

"7835. Organizers—Articles of Incorporation—Contents and Filing—A co-operative association may be organized under the provisions of this act by five or more incorporators, who may act for themselves as individuals or as the agents of other co-operative associations, whether organized under this act or otherwise."

The opinion in question (R. 141, l. c. 166) of the Circuit Court of Appeals reported in 125 F. 2d 618, l. c. 634, includes the following principal holding of the case:

"It is of course true that there is nothing inherently evil in petitioner's practice of giving patronage dividends to its retail cooperative members, and that such dividends partake in no way of the unsavory character normally associated with rebates. But regardless of moral connotations, the Act is explicit in prohibiting 'a discount, dividend, allowance, or rebates' whereby a retailer or industrial consumer is enabled to purchase coal at a price below the minimum price established under the Act. It is clear that what is prohibited here is any device which permits a code member to furnish coal to a retailer or consumer at a price below the minimum; since patronage dividends clearly tend to do so they are embraced within this broad prohibition."

Petitioner expresses the conviction that the aforesaid summary of the opinion of the court below is in conflict

with the public policy of the State of Minnesota as expressed in its Cooperative Statutes. The court below clearly states that patronage dividends are unlawful because they tend to allow retailers and consumers to purchase coal at a price below the minimum price fixed by the Division. Still, it states that there is nothing inherently evil in them.

The Bituminous Coal Act of 1937 was intended to be helpful to the consumer. No part of it tends to indicate that the Congress was intending to prevent the consumer from getting coal through legally controlled marketing channels at a price below the minimum. The Congress intended to eliminate evils. It intended to eliminate the evils which former Justice Cardozo said "have degraded the bituminous coal industry into anarchy." It is not an evil for consumers to provide coal for themselves through cooperative associations at cost. The retail association, being a mere link in the chain, does not gain any benefit or any unfair advantage over its competitors. The holding of the court below is therefore not only in conflict with the intent of Congress toward the interest of consumers of coal, but it is in conflict with the intent of the Cooperative Statutes of the State of Minnesota.

Minnesota is the cradle of the cooperative movement in the United States. At the beginning of the year 1939, there were 1,471 active cooperative associations in Minnesota, being more cooperative associations than are found in any other state. It is 13% of all of the cooperative associations in the United States. During the ten year period from 1910 to 1920, 1,218 farmers' cooperative associations were incorporated in Minnesota. This is a greater number than have been incorporated in any other state during any ten year period. Moreover, the cooperative movement assumed mass proportions in Minnesota relatively earlier than in any of the other states.

Also, the North Central States, comprising the group of states wherein petitioner's member associations are in-

corporated, contain nearly two-thirds of all of the farmers' cooperatives in the United States. More than 30% of them lie in the specific states wherein petitioner's retail cooperative member associations are incorporated.

So far as the State of Minnesota is concerned, the incorporation of cooperative associations is not limited to farmers' associations, either farmers' producing associations or farmers' purchasing associations. Consumers, without respect to occupational groups, may freely incorporate cooperative associations under the laws of the State of Minnesota to engage in any kind of cooperative enterprises.

If the greater portion of the 1,471 active cooperative associations incorporated under the laws of the State of Minnesota are controlled by farmers, it is because the cooperative movement has found a greater response among farmers than other occupational groups. Notwithstanding such fact, the laws of Minnesota invite all occupational groups to incorporate to carry on any kind of business enterprises on the cooperative plan. Therefore, the fact that the greater portion of the 1,471 active cooperative associations in the State of Minnesota are farmers' associations does not minimize petitioner's contentions that the opinion of the court below which holds that patronage savings of cooperative associations organized in Minnesota are the legal equivalent of unlawful rebates and price allowances is in conflict with the public policy of the State of Minnesota. It is the Minnesota law itself which signifies the public policy of that State, and not the type of cooperative associations which are organized under it.

Petitioner will undertake now to explain that the opinion of the court below is in conflict with the public policy of the State of Minnesota by approaching the matter from a new point of view.

Laws of Minnesota, 1939, page 794, Chapter 403, Sections 1 to 7, being an amendment to a statute enacted

in former years, prescribes certain prohibitions against unfair trade practices of retail vendors and wholesale vendors. Prosecutions and penalties for violations are provided.

Any retail vendor or wholesale vendor who sells merchandise in the State of Minnesota at a price less than the price determined from the provisions of the Act, for the purpose or with the effect of injuring competitors or destroying competition, shall be deemed guilty of the violation of the Act.

It is suggested that the legal principle in the Minnesota Unfair Trade Practices Act is the same as that of the Bituminous Coal Act of 1937 which prohibits rebating or the making of price allowances. Therefore, if the Minnesota law prohibiting retail and wholesale vendors from making price allowances reaches patronage savings of cooperative associations incorporated under the Laws of Minnesota, all of the cooperative associations in Minnesota which sell to consumers, whether controlled by farmers or other occupational groups, are at the present time operating in violation of the State Unfair Trade Practices Act. Undoubtedly, they sell at prices below the minimum, if the distribution of patronage savings constitutes an adjustment in price.

It is presumed, however, that Minnesota's cooperative associations are operating in compliance with state laws. Hence the conflict between the Bituminous Coal Act of 1937 and the public policy of the State of Minnesota arises.

Petitioner respectfully contends that it is not the public policy of the State of Minnesota as expressed through its laws to characterize patronage savings distributed by the State's 1,471 active cooperative associations as the legal equivalent of price allowances or rebates. It is urged that the making of price allowances prohibited in the Minnesota Unfair Trade Practices Act are identical in legal nature with the price allowances prohibited in the Bituminous Coal Act of 1937.

A similar act prohibiting unfair trade practices is upon the statute books of more than forty states. It is the duty of the states' attorneys to prosecute violations of the laws mentioned. Petitioner suggests that it is within the common knowledge that there is no such campaign of law enforcement against cooperative associations throughout the nation.

Petitioner urgently requests the Court to consider carefully its suggestion that it is not requesting a general declaratory judgment on the question of the legal nature of patronage savings of cooperative associations. It is true that the legal question involved affects seriously cooperative associations of every kind throughout the United States. Nevertheless, petitioner recognizes the necessity of confining the legal question concerning patronage savings to their treatment within the provisions of the Bituminous Coal Act of 1937. Therefore, it is hoped that the Court will not disapprove on the ground that petitioner is going far away from the legal question involved for the purpose of asking for a general declaratory judgment on the legal question involved.

B.

The public importance of the case and of the legal question involved justifies the request that the Court should vacate its order denying certiorari and grant a rehearing on the petition for writ of certiorari.

In *State of Georgia* v. *Hiram W. Evans et al.*, decided April 27, 1942, 86 L. Ed. 929 (Adv. Op.), the Court took jurisdiction because the intervention by means of *amicus curiae* briefs of more than thirty states indicated a question of public importance.

It is acknowledged, of course, that it is within the discretion of the Court to determine when the public importance of a case is great enough to confer jurisdiction upon it. However, petitioner respectfully states that, based upon its best impression of the public importance of

the case of *Georgia* v. *Evans, supra,* the present case is of equal public importance. If it may be assumed that the case of *Georgia* v. *Evans, supra,* represents the first time any state has brought an action for treble damages under the provisions of the Anti-Trust Statute, a fair deduction can be made that like causes of action for treble damages under the Anti-Trust Statute in favor of the respective states will occur only rarely in the future. The case arose to one of sufficient public importance to confer jurisdiction, undoubtedly, because more than thirty states filed *amicus curiae* briefs.

Petitioner earnestly suggests that if the cooperative associations throughout the United States, of which there are approximately 15,000, were alert to the dangers of the legal precedence established by the opinion of the Circuit Court of Appeals, and were able financially, like the states, to employ counsel to represent them, very many *amicus curiae* briefs would have been filed in support of petitioner's case in the Circuit Court of Appeals and also in the Supreme Court in support of petitioner's petition for writ of certiorari. Petitioner desires to suggest that such support would come not only from consumers' cooperative associations, but from so-called *bona fide* and legitimate farmers' cooperative associations as well. The opinion of the Circuit Court of Appeals places a cloud upon the title of cooperative associations among farmers to operate without hindrance under state laws. The interests of farmers' cooperative associations are affected seriously, notwithstanding the so-called "exemption" which the court below holds has been extended to farmers' cooperative associations under the provisions of paragraph 13 of Section 4 II (i) of the Bituminous Coal Act of 1937.

As has been stated heretofore in this petition, the regulation alleged to be authorized will destroy the coal business of wholesale cooperative associations which purchase coal for resale to retail cooperative associations

which are consumers' cooperative associations. Moreover, the holding of the court below will engender active prejudice among opponents of the cooperative movement. It is best, therefore, that the Supreme Court should decide the legal questions involved so that cooperative associations may know now whither they are traveling, so that they can request Congress and the state legislatures, if necessary, to supply corrective legislation.

In further pleading the public importance of the legal question arising under the provisions of the Bituminous Coal Act of 1937, petitioner requests the Court to take judicial knowledge of the fact that there is a dynamic surge among consumers all over the nation to provide themselves with the necessities of life, at cost, by means of the democratic principles of cooperation.

Fuel, including bituminous coal, is one of the necessities of life. The opinion under consideration holds that the Congress, in exercising its constitutional authority to protect interstate commerce, has set up a regulatory pattern which excludes from the field of competition in the bituminous coal business wholesale cooperative associations which purchase coal for resale to member associations which are consumers' retail cooperative associations.

It is not required that there shall be in progress an active crusade among consumers to enter cooperative associations as a means of supplying themselves with the necessities of life, including coal as fuel, in order for the question involved to be one of great public importance. The fact that public thought is veering steadily and surely toward the philosophy of economic and social security through cooperative practices is sufficient in itself to confer jurisdiction.

Cooperative associations generally, and consumers' cooperative associations in particular, will suffer in prestige as the result of the opinion of the Circuit Court of Appeals. The cardinal principle of cooperatives to be free

to operate in any field to procure necessities of life for consumers at cost is destroyed.

In Special Report No. 89 of the United States Department of Agriculture, Farm Credit Administration, published in July, 1941, entitled "Survey of National Cooperatives, Incorporated," by Joseph G. Knapp, petitioner, is listed as one of the fifteen large, member wholesale associations serving the needs of consumers primarily. It is conceded that, as yet, farmers, as consumers, dominate and control in most of these large wholesale consumers associations.

Minnesota is the only state in which more than one of these large wholesale associations serving consumers is located. Two of them are located in Minnesota. The total value of sales of consumers' supplies at wholesale in 1940 was $48,338,867.77. The same associations sold supplies at retail in the amount of $2,718,233.05 for the same year. The consumers' supplies handled include petroleum products, tires, tubes, automobile accessories, electrical equipment and appliances, farm machinery, hardware and tools, lumber, paint and roofing, steel and wire fence, feed, seed, fertilizer, twine, insect and fly spray, coal, groceries, and miscellaneous supplies. Eight of the wholesale associations were shown as handling coal in 1940.

The names and locations of the fifteen associations follow:

Indiana Farm Bureau Cooperative Association, Inc., Indianapolis, Indiana.

Farmers Cooperative Exchange, Inc., Raleigh, North Carolina.

Consumers Cooperative Association, North Kansas City, Missouri.

Farmers Union Central Exchange, South St. Paul Minnesota.

Central Cooperative Wholesale, Superior, Wisconsin.

Pennsylvania Farm Bureau Cooperative Association, Harrisburg, Pennsylvania.

Midland Cooperative Wholesale, Minneapolis, Minnesota.

Central States Cooperative, Inc., Chicago, Illinois.

Eastern Cooperative Wholesale, Inc., Brooklyn, New York.

Farm Bureau Services, Lansing, Michigan.

Pacific Supply Cooperative, Walla Walla, Washington.

Consumers Cooperatives Associated, Amarillo, Texas.

Farm Bureau Cooperative Association, Columbus, Ohio.

Saskatchewan Cooperative Wholesale Society, Ltd., Saskatoon, Saskatchewan, Canada.

United Farmers Cooperative Company, Ltd., Toronto, Ontario, Canada.

Petitioner, as an active member of National Cooperatives, Incorporated, states that the consumer movement among cooperatives, without respect to occupational groups, is expanding rapidly. Moreover, there is a tendency toward a thorough blending of all occupational groups into consumers' cooperatives without respect to specific name or identity of such groups. The non-farm groups are manifesting an active interest in cooperative endeavor at a rapid rate. Educational leaders are placing more emphasis upon the consumers' movement, generally, without reference to occupational groups. Where state laws are drafted primarily for the benefit of farmers as producers and purchasers of farm supplies, there is strong pressure to stretch corporate charters to serve consumers generally, notwithstanding the inadequacy of the state laws. In Minnesota, however, state laws are adequate to include all occupational groups in the consumers' movement for cooperative endeavor. The public policy in that State has long since been settled.

Regardless of the final outcome, the cooperative movement among consumers should not be compelled to grope

in darkness. Under the present opinion of the court below it is without a chart and compass. The public interest is so great as legally to warrant that the Supreme Court should act. Indeed, the cooperative movement among consumers of whatsoever occupational groups will be better served with an intelligent, elucidating opinion from the Supreme Court against it than to be required to meet the prejudice that the present opinion of the court below will engender. The opinion is a cloud upon the legal character of farmers' associations, whether consumers' associations consisting of farmers or producers associations, consisting of farmers. In respect to consumers' associations composed of occupational groups other than farmers, the opinion sounds the death knell. It should be reviewed.

Finally, petitioner draws the attention of the Court to the fact that the Consumers' Counsel Division created under the Bituminous Coal Act of 1937 appeared (R. 36) and took an active interest in behalf of petitioner's application when it was heard before the Bituminous Coal Division. Petitioner also directs the attention of the Court to the fact that The Cooperative League of the United States of America was represented (R. 36) at the hearing by Mr. John Carson, its Washington Representative. The Consumers' Counsel Division filed a brief (R. 114) and its active interest in the case is recognized (R. 119) in the order of the Director of the Bituminous Coal Division.

The fact that the Consumers' Counsel Division and The Cooperative League of the United States of America took an active interest in the case when it was heard by the Bituminous Coal Division emphasizes the public importance of the legal question involved. The fact that the Consumers' Counsel Division and The Cooperative League of the United States of America did not pursue the case on appeal and on the filing of petition for certiorari in the Supreme Court should not detract from the public importance of the case.

C.

Petitioner feels justified in asking the court to grant rehearing to reconsider its petition for writ of certiorari on the ground that the legal nature of patronage savings of cooperative associations raises an important question of Federal law which has not been but should be settled by the Supreme Court.

In *Gray* v. *Powell*, 86 L. Ed. 285 (Adv. Op.), wherein the Seaboard Air Line Railway Company was held not to be a "producer" of coal and therefore not entitled to exemption under the Bituminous Coal Act of 1937, the court said:

> "As the question of Federal law was important and unsettled by any decision of this Court, certiorari was granted, * * *"

Therefore, upon the authority of the case of *Gray* v. *Powell, supra,* it seems that the question of Federal law, which has not been settled by any decision of the Supreme Court, is important enough to warrant the Supreme Court to take jurisdiction to review the opinion.

An opinion of one of the lower courts of the United States which holds that the Congress, under its constitutional authority to protect interstate commerce, has launched a regulatory program which may in time destroy cooperative associations incorporated under state laws and thereby nullify those state laws is a far-reaching and important one. It contains an important question of Federal law which the Supreme Court should review.

In their brief in opposition to the petition for writ of certiorari, respondents (R. 16) concede that this is "the only case in which the point has been raised." Petitioner would appreciate the opportunity to explain to the Court its conception of the legal distinction between patronage savings and the rebates or price allowances which are prohibited by paragraph 12 of Section II (i) of the Bituminous Coal Act of 1937. If given the opportunity to

do so, it feels confident that it can convince the Court that the Circuit Court of Appeals committed error on this point. It is a point of important Federal law which has never been decided by the Supreme Court.

D.

Petitioner apprehends that the court did not give sufficient attention to its contention that the holding of the court below on the question of congressional intent is in conflict with the cases cited in petitioner's suggestions.

The opinion of court below lays great stress upon the legislative history of an effort on the part of consumers' cooperatives to have the Congress adopt an amendment to paragraph 13 of Section 4 II (i). The opinion presumes that this paragraph is an "exemption" to farmers' cooperative associations, whereas petitioner urges that it is merely an interpretative provision to prevent misunderstanding.

The executive order of the President in NRA days is cited by the court below as illustrative of the contention that patronage savings of cooperative associations are within the prohibitions of the Bituminous Coal Act of 1937. The President's order in the NRA situation only proves petitioner's contention here. First, the President can not construe the law. He did not undertake to construe the NRA code. Construction of the law is for the courts. The President merely interpreted the NRA law. He merely told his subordinates that he did not interpret the NRA Act to include within its prohibitions the patronage savings of cooperative associations. Therefore, he informed his subordinates that he did not desire that they should enforce the NRA law in a manner which would include patronage savings of cooperative associations.

It has frequently been held that where a proposed amendment is defeated, the legislative intent is not to be construed as embracing the effect of the language rejected. *U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 414, 53 L.

Ed. 515; *Pa. Ry. Co.* v. *Int'l Coal Co.*, 230 U. S. 184, 57 L. Ed. 1446; *Lapina* v. *Williams*, 232 U. S. 78, 89, 58 L. Ed. 515; *Fox* v. *Std. Oil Co.*, 294 U. S. 87, 96, 79 L. Ed. 780.

Without legal justification, the opinion of the court below holds that patronage savings of consumers' cooperatives are within the prohibitions of paragraph 12 of Section 4 II (i). There is nothing in the Act itself showing an intention to include consumers' cooperatives. The Division and the court below justify the holding solely on the ground that consumers' cooperatives, allegedly, endeavored to have themselves brought within the so-called exemption of paragraph 13 of Section 4 II (i). Since those endeavors resulted in failure, it is held that patronage savings of consumers' cooperatives are within the prohibitions of paragraph 12 of Section 4 II (i). Such holding should be reviewed. It is in conflict with the cases cited, *supra.*

Even if farmers' cooperative associations are within the prohibitions of the Act, it does not follow that consumers' cooperative associations are likewise within them. By the same reasoning applied by the Court below, it may be logically contended that Congress was free to include farmers' cooperative associations and to leave out consumers' cooperative associations. There is no express provision in the Act showing that Congress intended to include consumers' cooperative associations. In fact, the only provision in the Act tending to show that Congress intended to include farmers' associations is the so-called exemption provided them in paragraph 13 of Section 4 II (i). If petitioner's contentions are correct, namely, that such provision is solely one of interpretation to prevent misunderstanding, it is correct to say that the Act not only does not expressly include farmers' cooperative associations but that paragraph 13 of Section 4 II (i) manifests an intention of Congress to say clearly that farmers' cooperative associations are not within the Congressional intent.

Therefore, the only basis for the holding that patronage savings of Consumers' cooperative associations are within the intent of Congress and therefore within the prohibitions of paragraph 12 of Section 4 II (i) is the holding of the Division and the court below that patronage savings and rebates or price allowances are legally the same thing.

If the Court will agree with petitioner that such holding is the sole basis of bringing patronage savings within the prohibitions of the Act, it is believed it will grant a rehearing. Surely, without express language by Congress that patronage savings of consumers' cooperatives are intended to be within the Act, the Court will deem the Federal to be one of sufficient importance to review it.

E.

The court has overlooked the fact that there is no finding of fact that the distribution of patronage savings by petitioner affects interstate commerce.

The Division made the sole finding that

> "Under paragraph 13 of Section 4 II (i) of the Act, sales to *bona fide* and legitimate farmers' cooperatives may involve the granting of a 'discount, dividend, allowance or rebates' though such sales generally would be an unfair trade practice under paragraph 12."

But the Division by means of such mere recitation of the statute does not find from the evidence presented at the hearing that interstate commerce would be affected injuriously, or otherwise, by petitioner's practices. Hence the Court should not assume that the distribution of patronage savings are, as a matter of fact, injurious to interstate commerce in bituminous coal.

The Division finds that the statute prohibits rebates and price allowances as unfair trade practices. That is conceded. It is conceded also that petitioner distributes

its patronage savings under the laws of Minnesota. Thereupon, the Division finds, as a matter of law, that petitioner's operations are unlawful in the respects under consideration.

Therefore, the Court should clearly recognize that the record does not show that petitioner's practices are, as a matter of fact, injurious to interstate commerce. Indeed, the court below in speaking of petitioner's practices (R. 166) finds that,

> "It is of course true that there is nothing inherently evil in petitioner's practice of giving patronage dividends to its retail cooperative members, and that such dividends partake in no way of the unsavory character normally associated with rebates."

This explanation is included, lest the Court should have believed at the time it denied certiorari that the record discloses, as a finding of fact, that petitioner's distribution of patronage savings injuriously affects interstate commerce. Upon making this point clear, the Court is invited to understand that the only question involved is a legal one, namely, whether patronage savings and rebates and price allowances are by legal nature the same thing and that, if so, their distribution, as a matter of law, should be prohibited without the necessity of a finding of fact that they injuriously affect interstate commerce. It is true that the granting of rebates and making of price allowances are declared in the Act itself to be unfair practices in competition. Therefore, it is important for the Court to review the question in order to determine whether patronage savings and rebates and price allowances are the same thing, legally, or by inherent nature.

Petitioner itself would admit that if a clear finding of fact, either by the Congress or the Division, that the distribution of patronage savings are legally the same thing as rebates or price allowances (and are therefore within the body of evil intended to be cured), and in-

juriously affect interstate commerce, the Congress has power under the commerce clause of the constitution to take the necessary steps to protect such commerce from injury. But it is unbelievable that the Congress has made such a legislative finding of fact. Not once during the long legislative history of the coal Act did it consider the practices of cooperative associations. Moreover, there is no express language in the Act itself tending to show the Congress so intended. Finally, the Division and the court below concede that no administrative finding of fact has been made. Reliance is placed solely upon the interpretation of paragraph 12 of Section 4 II (i), to bring petitioner's patronage savings within the scope of the prohibitions therein.

It is believed that this further explanation of the situation should persuade that Court that the question is purely one of law. The holding of the Division and the court below is not based upon any legislative or administrative finding of fact that patronage savings injuriously affect interstate commerce. Hence the legal question is one of great importance in Federal law.

F.

The court, apparently, gave no consideration to petitioner's point that the order is so erroneous as to warrant that the court should exercise its supervisory powers. Surely, if the court should determine that the order is actually in serious conflict with procedural principles, it would exercise its supervisory powers.

Petitioner states with much conviction that the Court has not given consideration to the point. It will, therefore, analyze the order in this respect again.

First, the order authorizes petitioner to engage in the coal business as an "intervening agency" in a dual capacity, *i. e.,* (a) with its member associations which are so-called "*bona fide* and legitimate farmers' associations," and (b) with its member associations which are so-called

consumers' cooperative associations. Petitioner may receive from producers the allowable discount fixed by the Bituminous Coal Division on coal which it purchases for resale to its member associations which are farmers' associations. Petitioner, however, is prohibited from receiving the allowable discount on coal which it purchases for resale ("to others") to its member associations which are consumers' associations. There is, therefore, a dual standard set up. Petitioner must keep two sets of accounts, one in connection with coal purchased for resale to its farmers' associations and one in connection with coal purchased for resale to its consumers' associations.

Such dual standard itself is bad from a practical standpoint but it is not a point of legal objection to the order. It is explained to direct attention to the legal objection to the form of the order.

The legal objection to the form of the order is that it sanctions unlawful rebating on the part of petitioner in dealing with its consumers' associations.

In order to weigh the seriousness of the situation, the Court should assume that petitioner will engage in the coal business under the terms of the order. If it does the order will work out as described in the following paragraph.

Petitioner will purchase coal from producers for resale to its retail member associations which are consumers' associations at the minimum price, but it will not be allowed thereon to receive the discount fixed by the Division. Let it be assumed that petitioner will purchase coal from producers for resale to its consumers' associations at a minimum price of $2.25 per ton. Let it be assumed, further, that petitioner will sell such coal to one of its consumers' associations at $2.75 per ton, the market price in the territory. Here is a margin of 50c per ton, out of which to pay distribution costs. Petitioner may save some of this 50c. If it does, it will distribute it back to its consumers' associations who purchased coal

from it. It is legally obligated under the Minnesota law and its charter to do so.

Hence, if paragraph 12 of Section 4 II (i) of the coal Act is to be construed consistently, any distribution of savings made on this 50c constitutes rebating or the making of a price allowance prohibited therein. Therefore, the order itself sanctions rebating of savings from this source. The order provides for a law violation which the Division is supposed to prevent. Petitioner would within the terms of the order do specifically that which the Division says it cannot do generally, *i. e.*, make a rebate or a price allowance.

The Act does not limit the prohibition of rebating or the making of price allowances to the discount. It prohibits all rebating and making of price allowances. It does not provide that rebating of savings derived from a particular source is prohibited, but allowed if derived from another source.

Petitioner believes it is justified in saying that the form of the order is bad because it clearly authorizes petitioner to violate the law in distributing patronage savings derived from any amount added to the minimum price.

It is urged with great sincerity that the Court has not considered the order from the point of view herein explained. The Court should not allow an order of a Federal administrative agency to stand which authorizes the violation of the statute which the administrative agency is obliged to enforce. The matter is, it seems, important enough for the Court to exercise its supervisory powers to disapprove an order which sanctions violation of a Federal statute.

It should not be assumed that petitioner will be driven from the coal business by the destructive nature of the order and that nothing of importance in a practical way will occur. That is what will probably occur, if the order stands. However, the form of the order is bad. It is an undesirable legal pattern. Its bad form and the bad re-

sults sanctioned thereby warrants an exercise of the supervisory powers of the Court.

If it should be assumed that petitioner will engage in business under the order, it will immediately be in violation of the Act, under the sanction of the inconsistent order. Petitioner should choose not to operate under the terms of an order which authorizes it to violate the Act. However, if it should be justified in operating under subsection (b) of the order, would the Division not then be compelled to act? Will the Division act then to stop petitioner from rebating in the manner sanctioned by its own order? The matter should be settled now. It is an important question of procedural law.

Petitioner asks the Court, therefore, to reconsider its point on the question of Congressional intent.

Conclusion.

Another case bringing the question of the legal nature of patronage savings of cooperative associations may not reach the Supreme Court in many years to come. The precedent of the opinion of the court below will in the meantime discourage cooperatives which are consumers' cooperatives from going into the coal business. The case holds that the Congress intended to create a regulatory pattern within the bituminous coal industry, the practical effect of which is to exclude consumers' cooperative associations from this particular field of interstate competitive enterprise. The case holds that farmers' cooperative associations are "exempted." It is in conflict with the laws of Minnesota and other states under which cooperative associations are, indiscriminatively, incorporated. It is against the public interest.

The Court should take judicial knowledge of the intensive national interest in the principles of cooperation as a practical means of providing an economic and social program of a higher order than that which is provided through the profit system. This fact alone is sufficient to confer jurisdiction on the Court to review the opinion of

the court below. It is within the common knowledge that the President has more than once expressed his interest in consumers' cooperatives as a practical means of providing better national and international trade relations. His personal and official advisers have expressed the public importance of the movement from time to time. So have leaders in Congress. The Court is no doubt familiar with such facts. Its alertness to them should be manifested in the setting aside of the order denying certiorari and in granting a rehearing thereon.

Today the Court has rejected principles of substantive law which it embraced yesterday. Petitioner is asking the Court to liberalize its rule of procedural law applied when it denied *certiorari*.

The Court has knowledge of the present importance of the cooperative movement. It realizes that the legal question involved transcends a mere single application or series of applications under the Bituminous Coal Act of 1937. It is not required to consider narrowly the procedural question of whether it shall review the case. It has sufficient constitutional and statutory authority to exercise its discretion broadly in the public interest. It may with judicial wisdom forecast public needs and events. It, with entire propriety, may base its decision to review this case upon such a forecasting of public interest and coming events. It is requested to act upon such broad powers of judicial discretion. In so doing it would not be expressing itself as to what the public policy should be. It would only (and with great propriety) lay a judicial cornerstone upon which a wise public policy may be built. Legislative action in the public interest is often impeded or fettered due to the fact judicial opinions have not sufficiently thrown light either upon the present surroundings or upon the pathway ahead.

It seems improper that petitioner should be confronted with the need or temptation to put on a campaign among cooperatives or others to file *amicus curiae* briefs to convince the Court of the public importance of

the case. Reasonable procedural rules should exclude such action.

The Court is well informed on general economic and social trends. It is not bound by procedural fetters. It may act on its sole knowledge and judgment. That is what petitioner is pleading with the Court to do.

WHEREFORE, petitioner requests the Court to vacate its order of April 27, 1942, denying its petition for writ of certiorari and to reconsider said petition.

Respectfully submitted,

DANIEL C. ROGERS,
Attorney for Petitioner.

Certificate of Counsel.

Daniel C. Rogers, undersigned counsel for petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

DANIEL C. ROGERS,
Attorney for Petitioner.